Supreme Court, U.S.
FILED

No. 05-703 AUG - 3 2005

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IN THE

Supreme Court of the United States

GERARD ANGULO,

Petitioner,

—against—

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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August 3, 2005

QUESTIONS PRESENTED

(1) Does procedural due process, as imposed on the States by the Fourteenth Amendment to the United States Constitution, require that a defendant in a civil proceeding be given an opportunity to discover relevant evidence in his adversary's sole possession before the entry of summary judgment against him.

(2) Does § 3214(b) of New York's Civil Practice Laws and Rules (App., *infra*, 23a-24a), as applied by the New York Supreme Court in this case to deny petitioner any opportunity to conduct discovery prior to the entry of summary judgment against him, violate the due process clause of the Fourteenth Amendment.

LIST OF PARTIES TO THE PROCEEDINGS

The petitioner is Gerard Angulo, a United States citizen and resident San Juan, Puerto Rico.

The respondent is Skadden, Arps, Slate, Meagher & Flom, LLP ("Skadden"), a Delaware limited liability partnership, which has offices in New York, New York and in many other locations.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision by New York State Supreme Court Justice Shirley Werner Kornreich granting Skadden summary judgment (App., *infra*, 1a-16a) was entered on November 21, 2003. This decision is not reported.

The appeal from Justice Kornreich's decision was denied by the order (App., *infra*, 19a-20a) of the Appellate Division of the New York State Supreme Court on February 8, 2005. This order is reported at 15 A.D. 3d 226, 788 N.Y.S.2d 846 (1st Dept. 2005).

On April 19, 2005, the Appellate Division of the New York State Supreme Court entered an order (App., *infra*, 17a-18a) denying Angulo's motion for reconsideration of its prior February 8, 2005 order denying the appeal. This order is not reported.

On May 5, 2005, the New York Court of Appeals entered an order (App., *infra*, 21a) denying Angulo's motion for leave to appeal. This order is not reported.

JURISDICTION

The Jurisdiction of the United States Supreme Court is based on 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the New York Civil Practice Laws and Rules (§§ 3212 and 3214) are set forth in the Appendix (App., *infra*, 22a-24a).

STATEMENT OF THE CASE

A. Prior Procedural History

In 2002, Skadden sued Angulo in United States District Court for the Southern District of New York in an action entitled *Skadden v. Angulo*, 02 Civ. 9322 (RB) (S.D.N.Y.) ("the Federal Fees Action"). (*See* App., *infra*, 25a-27a.) Skadden's lawsuit contended that Angulo owed it a total of $814,749.10 in attorneys fees incurred while representing Angulo in a prior action entitled *Nemazee Capital Corp. v. Angulo Capital Corp.*, 96 Civ. 1023 (RO) ("the *Nemazee* Action"). (App., *infra.*, 1a-2a.) The $814,749.10 Skadden sought to recover was over and above $1,020,014 Angulo had previously paid Skadden for services Skadden had rendered in the *Nemazee* Action. (App., *infra*, 4a.)

In 2003, at the initial scheduling conference in the Federal Fees Action, Skadden requested permission to move for summary judgment *before* the parties engaged in any discovery. Angulo opposed Skadden's request on the grounds that Skadden had, within its exclusive possession, discoverable evidence which would prove that its bills were based, in part, upon falsified time records. United States District Court Judge Richard Berman denied Skadden's request to move immediately for summary judgment, granted Angulo's request for discovery and ordered a 30-day discovery period. Shortly before this discovery was scheduled to begin, Skadden requested and obtained a dismissal of the action without prejudice, based on its assertion that it had "discovered" that federal diversity jurisdiction, in fact, did not exist. (App., *infra.*, 25a-27a)[1]

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[1] Apparently, certain Skadden partners were United States citizens were domiciled overseas. Skadden contended that these partners were neither residents of State nor residents of a foreign state, a sta-

Shortly after the dismissal of the Federal Fees Action, Skadden re-filed its claims against Angulo in the New York State Supreme Court for New York County. Immediately after Angulo filed his answer to Skadden's complaint, and before Angulo had served any discovery demands, Skadden moved for summary judgment. Under § 3214(b) of New York Civil Practice Law and Rules ("CPLR"), Skadden's summary judgment motion automatically stayed discovery.

Angulo opposed Skadden's summary judgment motion and, in his affidavit opposing the motion, pointed out that certain activities described in Skadden's bills and time sheets had never been completed or accomplished. Angulo's affidavits also identified several areas of discovery which would have enabled him to oppose at least part of Skadden's summary judgment motion. Angulo, therefore, requested the Court to lift the automatic discovery stay, and defer any determination of the summary judgment motion until after he had obtained discovery in those areas.

Justice Kornreich did not address Angulo's request to lift the discovery stay and granted summary judgment in Skadden's favor. (App., *infra.*, 1a-16a). Angulo thus had summary judgment entered against him even though he had no opportunity whatsoever to obtain discovery of documents which would have permitted Angulo to oppose at least part of Skadden's claims for fees. The total judg-

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tus which, it asserted, precluded it from invoking federal diversity jurisdiction. Notwithstanding Skadden's representation to Judge Berman that the foreign domiciliaries of some of its partners prevented it from ever invoking federal diversity jurisdiction, Skadden has continued to rely on diversity jurisdiction in another fees action entitled *Skadden v. Learning Time 2000* in the U.S. District Court in Delaware. Skadden filed the *Learning Time 2000* case and the federal action against Angulo almost simultaneously in late 2002. http://pacer.tnmd.uscourts.gov/dc/cgi-bin/pacer250.pl?puid=01089465241.

ment entered against Angulo, including interest and costs, was in the amount of was $1,238,890.31.

Angulo appealed to the Appellate Division of the New York State Supreme Court (First Judicial Department). The Appellate Division affirmed the grant of summary judgment in Skadden's favor, and did not address or even acknowledge Angulo's contention that he should have been granted discovery. (App., *infra*, 19a-20a.)

The New York Court of Appeals subsequently denied Angulo's motion for leave to appeal. (App., *infra*, 21a.)

B. The *Nemazee* Action

Prior to 1996, Angulo's company, Angulo Capital Corp. was a partner in a partnership known as First Capital Partners, along with another corporation, Nemazee Capital Corp. In 1996, Nemazee Capital Corp. commenced a lawsuit against Angulo and Angulo Capital Corp. ("the *Nemazee* Action," as defined above). In the *Nemazee* Action, Nemazee Capital Corp. demanded the judicial dissolution of First Capital Partners and the sale of the sole significant partnership asset, a Puerto Rican newspaper known as the *San Juan Star*, at a judicial auction. (App., *infra*, 2a.)

Angulo engaged Skadden to represent him and Angulo Capital Corp. in the *Nemazee* Action. Angulo opposed the dissolution of First Capital Partners and counterclaimed for an order permitting him to purchase *The San Juan Star* at a judicially-appraised value.

The *Nemazee* Action was very abbreviated. The parties agreed on streamlined procedures and did not serve interrogatories, requests for admissions, motions to dismiss or summary judgment motions. As a result of these streamlined procedures, the *Nemazee* Action, which was commenced in February 1996 was tried in June 1996.

(App., *infra*, 2a-3a). After the trial United States District Court Judge Robert Owen ordered the dissolution of First Capital Partners but also entered a judgment allowing Angulo to purchase *The San Juan Star* at a judicially appraised price. A hearing on the valuation of *The San Juan Star* followed. Despite these streamlined procedures, Skadden billed Angulo a total of $997,487 for the period through the trial and valuation hearing. Angulo paid the entirety of this amount.

The sole real issue on the *Nemazee* appeal was whether Judge Owen had correctly permitted Angulo to purchase *The San Juan Star* asset on the grounds that he, unlike Nemazee, had not engaged in any conduct contributing to the dissolution of First Capital Partners. Despite the straight forward nature of the appeal, Skadden billed Angulo a total of $617,598 for the appeal. During the appeal, Angulo began to suspect that Skadden was rampantly inflating its time charges and stopped paying Skadden's bills.

After the appeal, Angulo did not authorize Skadden to do any work and did not hear from Skadden. Skadden, however, continued to bill Angulo. For the period following the *Nemazee* appeal, Skadden's time sheets only referred generically to activities relating to purported "partnership dissolution activities," and were completely void of any detail, *e.g.*:

01/08/99 1.50 ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES

01/11/99 1.50 ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES

01/19/99 1.50 ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES

01/20/99 1.50 ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES

01/28/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
02/03/99	1.50	ASSISTANCE RE: PARTNERSHIP DISSOLUTION ISSUES
02/05/99	2.00	ASSISTANCE RE: PARTNERSHIP DISSOLUTION ISSUES
02/10/99	2.00	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
02/19/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
02/22/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
02/23/99	1.00	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
03/03/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
03/11/99	3.50	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
03/17/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
04/08/99	1.00	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
04/16/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
04/19/99	2.00	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
04/28/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
04/30/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES

05/03/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
05/06/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
05/07/99	2.00	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
05/11/99	2.00	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
05/13/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
05/20/99	1.50	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
05/21/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTIONS MATTERS
05/25/99	2.50	REVIEW PARTNERSHIP DISSOLUTION REQUIREMENTS
05/28/99	2.50	REVIEW OF PARTNERSHIP DISSOLUTION REQUIREMENTS
06/01/99	2.50	REVIEW OF PARTNERSHIP DISSOLUTION REQUIREMENTS
06/04/99	2.50	REVIEW OF PARTNERSHIP DISSOLUTION REQUIREMENTS
06/07/99	1.00	ATTENTION TO PARTNERSHIP DISSOLUTION ISSUES
06/10/99	2.50	ATTENTION TO PARTNERSHIP DISSOLUTION MATTERS
06/11/99	2.50	REVIEW OF PARTNERSHIP DISSOLUTION REQUIREMENTS
06/15/99	2.50	REVIEW OF PARTNERSHIPS DISSOLUTION REQUIREMENTS

06/17/99 2.50 REVIEW OF PARTNERSHIPS DISSOLUTIONS REQUIREMENTS

06/18/99 1.50 REVIEW OF PARTNERSHIP DISSOLUTION REQUIREMENTS

(*See* App., *infra*, 9a.)

However, neither First Capital Partners nor the entities it owned were ever legally dissolved by Skadden (or any one else). Following the appeal, Skadden ceased communicating with Angulo altogether, except to demand that he pay additional legal fees.

C. Skadden's Summary Judgment Motion

As noted above, after Skadden dismissed the federal action it re-filed its claims against Angulo in the New York State Supreme Court for New York County. Immediately after Angulo answered, and before he had an opportunity to conduct any discovery, Skadden moved for summary judgment. Under CPLR § 3214(b), Skadden summary judgment motion automatically stayed all discovery. Thus, by dismissing the federal action and re-filing the case in the New York State court, Skadden was able to avoid the discovery which Judge Berman had ordered in the federal action.

D. Angulo's Response to Skadden's Summary Judgment Motion

Skadden's motion for summary judgment argued that Angulo had failed to dispute its bills in writing, and that, Skadden was entitled to summary judgment on its "account stated" and contract claims.

In opposition to the motion, Angulo submitted an affidavit, dated June 25, 2003, which demonstrated in detail that Skadden had billed him more than $170,000 after the conclusion of the *Nemazee* action, and that all cir-

cumstances indicated that no work was done during this time period. In this affidavit, Angulo expressly asserted that, following the *Nemazee* Action, he had received no phone calls, memoranda, research or correspondence from Skadden.

Angulo's affidavit further pointed out that the entirety of Skadden's time entries for the final $170,000 in time charges merely recited phases such as "Attention to Partnership Dissolution" or "Analysis of Partnership Dissolution Issues." Apparently, these purported time entries were intended to suggest ministerial activities involved in the dissolution of First Capital Partners as a legal entity. However, neither First Capital Partners nor any of the entities it owned were ever dissolved as legal entities.

Therefore, if Skadden had undertaken that work, its failure to accomplish it excused Angulo from any obligation he had to continue to pay legal fees. *Anvil Mining Co. v. Humble*, 153 U.S. 540, 551 (1894) ("Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; . . ." Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.")

Angulo also argued that the total lack of detail or itemization of particular activities in Skadden's time sheets indicated that Skadden was not performing any further services for Angulo.

Skadden's reply papers in support of its summary judgment motion did not even attempt to respond to these points or claim that it had actually performed any services during the period corresponding to the final $170,000 in time charges. In fact, these reply papers did

not include any affidavits whatsoever from any of Skadden attorney.

Angulo's affidavit in opposition to Skadden's summary judgment motion also requested that Justice Kornreich exercise her discretion under CPLR § 3212(f) to defer a determination of the summary judgment motion until after he had received several categories of discovery from Skadden. Specifically, Angulo sought to discover work-product which would have existed in Skadden's files had it actually undertaken any activities toward the legal dissolution of First Capital Partners or any activities whatsoever following the conclusion of the *Nemazee* Action. Had Angulo obtained this discovery, he would have been able to demonstrate the validity of his contention that Skadden had performed no services during the period following the *Nemazee* Action for which Skadden had billed him the final $170,000 in time charges.[2] (*See* App., *infra*., 9a.)

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[2] Specifically, Angulo sought:

(i) Any work product for the post-appeal period when Skadden was billing time for "Attention to the Dissolution of the Partnership," and during which Angulo was not receiving any communications or information from the firm.

(ii) Any documents prepared by Skadden Arps pertaining to the alleged services described on the time sheets in connection with dissolving First Capital Partners in Delaware when, in fact, First Capital Partners had neither a partnership certificate nor an office in Delaware and there was thus never any partnership in Delaware to dissolve.

(iii) Any attorney work-product in Skadden Arps files to determine if, during all the time allegedly devoted to the "dissolution of the partnership," any one at Skadden Arps even prepared or considered filing a "Certificate of Discontinuance of Business as Partners" with the New York County Clerk's Office.

(*footnote continued*)

Thus, the discovery that Angulo was denied deprived him of an opportunity to prove the sort of fraud in Skadden's billings which would have defeated the fees claims. *Marchi Jaffe Cohen Chrystal Rosner & Katz v. All-Star Video Corp.*, 107 A.D.2d 597, 599, 483 N.Y.S.2d 707, 709 (1st Dept. 1985) (a claim for an "account stated" may be defeated by "proof of fraud, mistake or other equitable considerations").

E. The November 21, 2003 Decision by Justice Kornreich

In a decision dated November 21, 2003 (App., *infra*, 1a-16a), Justice Kornreich granted Skadden summary judgment. The decision credited Skadden's argument that it had actually performed services following the conclusion of the *Nemazee* Action, and refused to credit Angulo's arguments—and all the circumstantial evidence which indicated—that no work had been done during this time period. (*See* App., *infra*, 9a.)

Justice Kornreich also ignored or implicitly rejected Angulo's argument that the determination of Skadden's summary judgment motion should be deferred until he had first had an opportunity to obtain discovery from Skadden.

(iv) The depositions of Glekel so as to understand how he could have performed $170,000 of services following the conclusion of the *Nemazee* action.

–and–

(v) Any research memoranda or printouts from Lexis or Westlaw, interoffice memos or research files indicating that Skadden Arps actually performed all the legal research concerning the dissolution of a partnership which has been billed for.

REASONS FOR GRANTING THE WRIT

The effect of the decisions below was to deny Angulo due process of law.

It is well-established that procedural due process, in the context of civil and administrative proceedings, requires notice, an opportunity to be heard, an impartial decision maker, and an opportunity to confront and cross-examine witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (1970); *Matthews v. Eldridge*, 424 U.S. 319, 343-345 (1976).

The Supreme Court has never directly confronted the issue of whether procedural due process includes a right to discovery in a civil action or an administrative proceeding. However, the District of Columbia Circuit Court of Appeals has recognized that, in administrative proceedings, "discovery must be granted if in a particular situation a refusal to do so would prejudice a party as to deny him due process." *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979)

The due process right to discovery in civil actions is at least co-extensive with the right to discovery in administrative proceedings.

Of course, "the effect of the guaranty [of due process] is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice or an opportunity for a hearing." 16 Am Jur. 2d Constitutional Law, section 544.

Therefore, the role which Courts play in entering judgments and orders which deprive litigants of property (or other protected interests) is state action which must comply with the due process clause. For example, in *Saunders v. Shaw*, 244 U.S. 317 (1917), the Court ruled that a due process violation had occurred when a state

appellate court vacated a judgment in favor of the plaintiff and entered judgment in favor of the defendant based on testimony which the plaintiff had never had an opportunity to rebut. *Saunders v. Shaw* thus recognizes that the role a court plays in entering a judgment in private litigation is sufficient state involvement to implicate due process. Recently, in *McKinney v. McKinney*, 820 N.E.2d 682 (Ind. App. 2005), the Indiana Court of Appeals expressly recognized that a court's role in implementing a provisional remedy is sufficient state involvement to justify review under the due process clause, stating

> In civil cases, . . . , a private litigant engages in the conduct that abridges an individual's rights, *i.e.*, such as the pursuit of a protective order. . . . Here, the trial court entered the protective order that deprived [the] [h]usband of his interest in the marital residence. Accordingly, there is sufficient state action to implicate [the] Husband's due process rights."

820 N.E.2d at 687 n.4.

See also: *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (the role of a judicial clerk in issuing summons of garnishment was sufficient state involvement to require review under the due process clause); *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (same).

These decisions each recognize that the judiciary has at least as much power as administrative agencies to deprive parties of property interests (and other protected interests). Accordingly, the due process right to discovery in civil actions should be at least as extensive as the right to discovery in administrative proceedings.

In *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), the Court recognized that "where governmental action

seriously injures an individual, and the reasonableness of the action depends upon fact-findings, the evidence used to prove the government's case must be disclosed to the individual so that he can show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

Under *Greene v. McElroy*, Angulo was entitled to discovery of any work product relating to Skadden's claim for $170,000 in fees allegedly incurred after the *Nemazee* Action had been concluded. Obviously, the New York court's action in entering judgment in Skadden's favor "seriously injured" Angulo. Also, the "reasonableness" of the New York Court's action in entering judgment against Angulo "depend[ed] upon fact-findings." Here, the New York court adopted as its fact-findings Skadden's assertion that it had performed services even after the *Nemazee* Action had been concluded. Under the holding in *Greene v. McElroy*, Angulo is entitled to disclosure of information which would enable him to show that Skadden's claim "was untrue."

Greene v. McElroy indicates that discovery is required where, without it, a party would effectively be deprived of his due process right to confront and cross-examine witnesses. Skadden's motion for summary judgment was based entirely on affidavits which merely appended Skadden's time records and asserted that they were accurate. These affidavits were never tested by discovery. Angulo presented numerous circumstantial arguments that the time records could not be accurate, including the point that the legal dissolution of First Capital Partners—the alleged activity which purportedly generated the final $170,000 of Skadden's time charges—had never been accomplished.

Section 3214(b) of the New York CPLR is unique and no similar provision exists under any other state civil practice rules. The Federal Rules of Civil Procedure, of

course, *require* that discovery will occur prior to the court entertaining a summary judgment motion. Fed. R. Civ. P. 56 provides that summary judgment motions will be based upon the: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . ." Obviously, before discovery occurs there will not be any "depositions, answers to interrogatories, [or] admissions" on file. Under the Federal Rules, summary judgment cannot occur prior to the parties engaging in at least some discovery.

Also, Fed. R. Civ. P. 56(f) provides that a party not having any specific material contradicting his adversary's motion for summary judgment may defeat the the motion by presenting reasons justifying his failure of proof. The Federal Rules thus ensure that a party will not be forced to defend a summary judgment motion when he has not yet been allowed discovery on critical issues.

CPLR § 3212(f) permits a court to defer the determination of a summary judgment motion to permit necessary discovery, but does not require that it do so:

> "[Where] facts essential to justify opposition [to a summary judgment motion] may exist but cannot then be stated, the court *may* deny the motion or *may* order a continuance to permit affidavits to be obtained or disclosure to be had and *may* make such other order as may be just." (Emphasis added.) (App., *infra*, 24a.)

Thus, in New York, under CPLR § 3212(f), even a party who, like Angulo, can show that information necessary to support his claim is in his adversary's sole possession, does not a have a *right* to discovery; instead, the matter is committed to the court's discretion.

Thus, under New York's Civil Practice Laws and Rules, there is not right to obtain discovery which may

defeat a summary judgment motion, merely an ability to invoke the court's discretion to allow it.

* * *

The automatic stay of discovery provided in CPLR § 3214(b) is dramatically contrary to the due process requirements imposed by the Fourteenth Amendment, not to mention the norms of modern civil litigation. As Angulo's dispute with Skadden in the New York courts confirms, the provision permits a party which has all of the relevant evidence in its possession to insulate itself from discovery by making a summary judgment motion at the outset of a case. In this fashion, CPLR § 3214(b) impinges upon the non-moving party's due process right to a fair hearing and right to confront and cross-examine witnesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 3, 2005

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APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

Index No.: 600814/03

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP,

Plaintiff,

—against—

GERARD ANGULO,

Defendant.

DECISION, ORDER and JUDGMENT

KORNREICH, SHIRLEY WERNER, J.:

This is an action by plaintiff law firm, Skadden, Arps, Slate, Meagher & Flom ("plaintiff' or "Skadden") to recover from its former client, defendant Gerard Angulo ("defendant" or "Angulo"), $814,499.10 in unpaid legal fees. Plaintiff now moves for summary judgment on its claims for an account stated and for sums represented by dishonored checks (plaintiffs second and third causes of action), as well as for dismissal of defendant's counterclaim, while defendant cross-moves to dismiss plaintiff's first (breach of contract) and third causes of action.

I. FACTUAL AND PROCEDURAL BACKGROUND:

A. Facts:

Defendant Gerard Angulo ("Angulo") is a sophisticated businessman with degrees in economics and business administration from Princeton and Harvard, and with a varied past career as both a business executive and as an adjunct professor at Columbia and New York Universities.

In early 1996, Angulo and his wholly owned corporation, Angulo Capital Corporation ("ACC"), were sued in Supreme Court, New York County by the Nemazee Capital Corporation ("NCC"), a New York corporation wholly owned by Hassan Nemazee ("Nemazee"). The litigation sought dissolution of the partnership between ACC and NCC known as First Capital Partners ("the Partnership"), based on, *inter alia*, alleged wrongdoing by Angulo. In its Complaint, NCC demanded, *inter alia*, a judicial sale of the San Juan Star ("the Star"), the Partnership's principal asset and the largest English-language newspaper in Puerto Rico. Angulo wished to continue publishing the Star and to become its sole owner through an appraisal and buyout of NCC's 49% interest. On February 7, 1996, Angulo therefore asked Skadden to represent him and ACC in the pending litigation, and on February 8, 1996 Skadden agreed. No formal written Retainer Agreement or Engagement Letter was ever entered into.

Skadden then: removed the action to the U.S. District Court for the Southern District of New York; prepared an Answer for Angulo which included a counterclaim for unpaid consulting fees; engaged in "voluminous expedited discovery;" and represented Angulo and his corporation during a seven-day bench trial, from June 13-21, 1996. *See* Affidavit in Support by Jeffrey Glekel,

pp. 4-5. In an Opinion and Order dated July 30, 1996, Judge Richard Owen refused to credit NCC's allegations of wrongdoing by Angulo, electing instead to dissolve the Partnership based solely on irreconcilable differences. The Court also ordered an appraisal of the Star and an opportunity for Angulo to acquire NCC's share at the appraised price. *See Nemazee Capital Corp.* v. *Angulo Capital Corp.*, No. 96 CIV. 1023 (RO) (S.D.N.Y. July 30, 1996), appended to Glekel Affirmation as Exhibit A.

Skadden continued to represent Angulo through the appraisal process. In accordance with the Court's Order, each party designated an appraiser to value the Star and to testify at a hearing, which was held on December 17, 18 and 19, 1996. At the hearing, Angulo's appraiser opined that the Star had an economic value of between $790,000 and $1.2 million above existing debt, whereas NCC's appraiser testified that the Star was worth $13.9 million above existing debt. In a Memorandum and Order dated May 8, 1997, as well as in an Order and Final Judgment entered July 24, 1997, Judge Owen: (1) dissolved the Partnership; (2) awarded Angulo the right to purchase NCC's interest in the Star based upon a valuation of $1 million net of existing debt; and (3) awarded Angulo consulting fees in the amount of $961,412, including interest. *See Nemazee Capital Corp.* v. *Angulo Capital Corp.*, appended to Glekel Affirmation as Exhibit B.

NCC appealed to the Second Circuit. Skadden continued to represent Angulo on the appeal. In an Opinion dated May 20, 1998, the Second Circuit affirmed the judgment of the District Court in its entirety. *See Nemazee Capital Corp.* v. *Angulo Capital Corp.*, 152 F.3d 919 (2d Cir., May 20, 1998), appended to Glekel Affirmation as Exhibit C.

Angulo thus became, and apparently remains to this day, the sole owner and publisher of the San Juan Star. Thereafter, according to Skadden, it continued to perform legal services for Angulo in connection with Judge Owen's Order, managing, *inter alia*, disagreements with NCC related thereto.

B. Plaintiff's bills:

According to plaintiff, beginning on March 26, 1996, and on a periodic basis thereafter until October 1999, Skadden sent Angulo twenty-nine invoices itemizing the daily time billed to Angulo's case by each Skadden attorney and the tasks s/he performed.[1] In addition, the statements listed the monthly total of hourly fees for support staff and of disbursements. Each invoice declared: "PAYMENT DUE UPON RECEIPT." *See* Glekel Affidavit ¶ 18, Exhibit D. Angulo accepted these invoices without objection, and, between June 1996 and August 2000, sent payments to Skadden totaling $1,020,979.00.

However, the pace of Angulo's payments slowed considerably after his May 1998 victory in the Second Circuit. Following one $150,000 payment at around the time of the Second Circuit decision, Angulo made no payments to Skadden until January of 2000, when Angulo sent Skadden fifteen post-dated $50,000 checks, drawn on the Star's bank account, to be applied to his outstanding debt. On February 4, 2000, Skadden attorney Glekel sent Angulo copies of all of his outstanding bills, "with complete time detail," in order to encourage Angulo to pay expeditiously the $234,499 that would still be outstanding after the fifteen post-dated checks were cashed ($750,000).

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[1] Angulo does not deny getting the 29 invoices but *does* contend that he never saw the hourly itemization until plaintiff made the instant motion.

On the appointed dates (1/31/00, 2/28/00 and 3/31/00), Skadden cashed the first three of the fifteen post-dated checks. Of the remaining fifteen, nine were dishonored based upon "stop payment" orders issued by Angulo. Skadden did not try to cash the last three after being told by Angulo that he had stopped payment on them as well. *See* Glekel Affirmation ¶ 23, Exhibits G, H.

Beginning in around May of 2000, Angulo began sending Skadden checks in diverse amounts, ranging from $10,000 to $50,000, purportedly to make up for the postdated checks that were bouncing. Some of these new checks cleared and others did not. The new checks were sent to Skadden attorney Glekel under cover of letters in which Angulo explained his straitened financial circumstances (allegedly due to successive emergencies, such as "an unexpected tax payment," an "old debt," "an act of God," etc.), apologized for the "inconvenience," promised that no future checks would be stopped, and vowed to "catch up quickly" on his debt to Skadden under a "new plan [that he was devising] to make good on these payments." *See* Exhibits G-N to Glekel Affirmation. By mid-2001, however, Glekel lost contact with Angulo, who no longer answered Glekel's letters or phone calls.

C. The instant lawsuit:

On or around March 14, 2001, plaintiff commenced the instant lawsuit against Angulo, seeking $1,200,639.09 as of May 30, 2003 (the unpaid $814,749.10 plus interest at the statutory rate beginning 30 days from the date of each invoice), plus $200.84 for each day thereafter that the debt remains outstanding.

The Complaint asserts three causes of action: (1) breach of contract, (2) an account stated, and (3) dishonored checks. In his Answer, dated April 11, 2003, Angulo

denies the material allegations in the complaint, and raises two affirmative defenses—i.e., (1) that "fraud and overbilling taint[ ] plaintiffs' invoices [and] preclude[ ] plaintiffs from stating a claim for an account stated," and (2) that plaintiffs claims are barred by the applicable statute of limitations. Angulo also asserts as a counterclaim that he is entitled to be reimbursed a portion of the fees he has paid to plaintiff "on the grounds of fraud and unjust enrichment" because his "[p]ayment of [plaintiff's] fees was induced by time records which were materially false and dramatically overstated and which inflated the time plaintiff's attorneys and employees spent on the matter." In its Reply to defendant's counterclaim, plaintiff asserts, *inter alia,* lack of sufficient pleading particularity to support defendant's "fraud" claim, lathes, statute of limitations, ratification, waiver, estoppel, lack of objection, and account stated.

II. CONCLUSIONS OF LAW:

Summary judgment should be granted

> if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. . . . . [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. . . .

CPLR 3212(b).

A. Plaintiff's case:

With regard to a cause of action for an "account stated," the "rule" is "that generally 'receipt and retention of [an obligee's] accounts [i.e., bills], without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [give] rise to an actionable

account stated entitling [the obligee] to summary judgment in its favor." *Moses & Singer L.L.P.* v. *S&S Machinery Corp.*, 251 A.D.2d 271 (1st Dept. 1998), *lv. dismissed/denied* 92 N.Y. 2d 1024 (1998), *quoting Rand Rosenzweig Smith Radley Gordon & Burstein* v. *Berger*, 248 A.D.2d 129, 130 (1st Dept. 1998); *see also Shea & Gould* v. *Burr*, 194 A.D.2d 369, 370-371 (1st Dept. 1993) (client's failure to object to attorney's unitemized bill for a period of five months "suffices to give rise to an account stated, especially in view of the partial payment made"). "[W]here an account is made up and rendered, he who receives it is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account and is binding on both parties—the balance being the debt which may be sued for and recovered at law." *Lockwood* v. *Thorne*, 11 N.Y. 170, 174 (1854); *Rosenman Colin Freund Lewis & Cohen* v. *Neuman*, 93 A.D.2d 745, 746 (1st Dept. 1983). "Even if defendant had received plaintiff's accounts and did not expressly assent, but failed to object to them within a reasonable time, he would be bound by them as accounts stated *unless* fraud, mistake or other equitable considerations were shown." *Marchi Jaffe Cohen Crystal Rosner & Katz* v. *All-Star Video Corp.*, 107 A.D.2d 597, 599 (1st Dept. 1985), emphasis supplied; *Rosenman Colin Freund Lewis & Cohen* v. *Neuman, supra*, at 746.

It is plaintiff's contention that Angulo received and retained *itemized* invoices sent to him by Skadden for three to five years, without complaint. It was only when plaintiff commenced the instant lawsuit that the defendant began to complain of plaintiff's allegedly inflated and even fraudulently contrived fees. Under the standards enunciated by the Courts, plaintiff has established its entitlement to judgment as a matter of law on its

cause of action for an account stated. It remains to be determined if Angulo has, in opposition, demonstrated by admissible evidence the existence of a factual issue suggestive of "fraud, mistake or other equitable considerations" requiring a trial. *Marchi Jaffe Cohen Crystal Rosner & Katz* v. *All-Star Video Corp., supra*; *see also Zuckerman* v. *City of New York, supra.*

B. Defendant's allegations of "fraud" and of "mistake or inequity":

Evidence intended to rebut the inference of an implied agreement to pay the stated amount must be more than "merely conclusory." *See Zuckerman* v. *City of New York*, 49 N.Y.2d 557 (1980); *Liddle, O'Connor, Finkelstein & Robinson* v. *Koppelman*, 215 A.D.2d 204 (1st Dept. 1995) ("[d]efendant's bald conclusory allegations of fraud, mistake and other equitable considerations are insufficient to defeat a motion for summary judgment"); *Shea & Gould* v. *Burr*, *supra*, at 371 ("While evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount, . . . defendants' allegations of protest are merely conclusory" when not enough detail is supplied). If "fraud" or "mistake" is alleged, it must be asserted with particularity. CPLR 3016(b).

Angulo has made the following factual averments in his affidavits in his attempt to show that fraud, mistake or at least inequity tainted Skadden's bills:

(1) *Fraud*: Angulo contends that he never received Skadden's detailed "time back-up" print-outs with his bills. Rather, he claims, he first viewed Skadden's itemized rationales for its bills when he saw them attached to Skadden's motion for summary judgment. During the

years when he was paying Skadden he received only elliptical invoices indicating the dates, hours spent and generic descriptions of the work done on his case, such as "Attention to Partnership Dissolution Issues." Since these invoices were vague, Angulo insists that he was fraudulently induced to pay them, because there was nothing to alert him to Skadden's billing chicanery. Now that he has viewed the detailed breakdown of hours, he can clearly see for the first time that Skadden inflated the time it claimed to have spent on, e.g., moving to amend Angulo's counterclaim, preparing for the appeal to the Second Circuit, and researching legal issues pertaining to the dissolution of the Partnership. Angulo questions, *inter alia*, the time allegedly spent by Skadden attorneys and paralegals on his case in the year and a half following the Second Circuit's May 20, 1998 decision on the appeal. He also challenges a bank of time charged to him in 1998, when a Skadden associate allegedly researched "partnership dissolution," among other things, under Delaware law. Although Angulo and Nemazee had amended their Partnership Agreement in 1994 to provide, *inter alia*, that the Partnership would be governed by Delaware law, the Partnership had in fact originally been registered in New York in 1987. Angulo's current attorney has ascertained that the Partnership was never (re-)registered in Delaware, and that as of June 2003 the New York Partnership had still not been dissolved.

The Court does not find that any of the foregoing states a defense of "fraud." Firstly, Skadden was not obliged to provide Angulo with detailed lists of time and tasks performed by each attorney in order to establish an account stated, so that even if Angulo did *not* receive the detailed printouts contemporaneously with his bills, their absence would not rise to the level of concealment or

"deception." *See, e.g., O'Connell and Aronowitz* v. *Gullo*, 229 A.D.2d 637 (3rd Dept., 1996), *lv. den.*, 89 N.Y.2d 803 (1996); *Shea & Gould* v. *Burr, supra,* at 370; *Fink, Weinberger, Fredman, Berman & Lowell, P.C.* v. *Petrides.* 80 A.D.2d 781 (1st Dept. 1981), *appeal dismissed* 53 N.Y.2d 1028 and 54 N.Y.2d 641 (1981).

Moreover, as noted above, the Courts have made clear that "where an account is made up and rendered, he who receives it is bound to examine the same, or to procure some one to examine it for him. . . . *Lockwood* v. *Thorne, supra,* at 170 ("As a general rule, when an account showing a balance is duly rendered, he to whom it is rendered is bound, within a reasonable time, to examine the same and object if he dispute its correctness. If he omit to do so, he will be deemed, from his silence, to have acquiesced, and be bound by it as an account stated"); *see also Rosenman Colin Freund Lewis & Cohen* v. *Neuman, supra,* at 746. To the extent that Angulo may be said to have "unreasonably failed to investigate the truth of [Skadden's] alleged misrepresentation[s]," and/or to have neglected to demand further itemization of the work allegedly represented by Skadden's bills, and/or to have failed to challenge a bill for misguided research into Delaware partnership law, Angulo may not set aside his contract with Skadden on the ground of "fraud in the inducement through fraudulent misrepresentations"—particularly *after* Skadden has fully performed under the parties' agreement. *Compare Callahan* v. *Miller,* 194 A.D.2d 904 (3rd Dept. 1993). To the extent that Angulo now challenges the reasonableness of the time spent and/or the sums charged for particular tasks as to which he did *not* voice an oral complaint, the rule is that "[i]t is not necessary to establish the reasonableness of the [lawyer's] fee [in an account stated" case] since the client's act of holding the

statement without objection will be construed as acquiescence as to its correctness." *O'Connell and Aronowitz* v. *Gullo*, *supra*, at 638.

In any event, the record evidence suggests that Angulo's representations of injured innocence are disingenuous. Angulo has been aware of the particulars of Skadden's time charges since at least February 4, 2000, when Glekel sent him copies of all of his outstanding bills "with complete time detail."[2] Yet Angulo did not challenge these charges until Skadden commenced the instant action in March 2003.

For all of the foregoing reasons, Angulo has not made out a defense of "fraud."

(2) *Mistake or inequity:* Defendant relates that he registered three oral protests regarding the size of Skadden's bills to Skadden attorney Glekel. Angulo first protested in March 1996, when he received his first Skadden bill, which was for $57,725.00, representing work performed in February 1996. According to Angulo, Glekel explained "that there was always a lot of learning time at the outset of a case, and that future bills would be smaller." However, the next bill was even higher. *See* Angulo Affidavit in Opposition at p. 11. Notwithstanding Angulo's alleged unhappiness with Skadden's high initial bills, defendant does not deny that he paid them all without further protest.

Angulo complained to Glekel again in May and October 1999, at which time Angulo told Glekel that "he would not pay for any work done in 1999 in connection with the dissolution of First Capital Partners." *Id.* at pp.

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[2] Skadden further underscores that Angulo "concedes" receiving time detail simultaneously with his May and October 1999 bills, since without the time detail he would not have known to complain to Glekel that he would not pay for 1999 work devoted to "dissolution of First Capital Partners."

25-26. In response, Glekel is alleged to have "answered vaguely that steps were being taken to minimize my future liability." *Id.* at p. 26. However, after these exchanges, Angulo does not deny that he continued to send checks and apologetic letters to Skadden without ever alluding in writing to his purported objections.

There is authority for the proposition that evidence of an oral objection to an account rendered—provided that it contains specific details and is not merely conclusory—"is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount." *See Diamond & Golomb, P.C.* v. *D'Arc,* 140 A.D.2d 183 (1st Dept. 1988), quoting *Sandvoss* v. *Dunkelberger,* 112 A.D.2d 278, 279 (2d Dept. 1985); *see also Gay Teachers Association* v. *Board of Education,* 183 A.D.2d 478, 479 (2d Dept. 1992). Here, defendant has identified the Skadden person to whom he spoke (Glekel), as well as the time and the substance of the three conversations that he had with Glekel about three of Skadden's twenty-nine bills. These conversations are insufficient to rebut an inference of implied agreement. As noted above, if Angulo *did* orally protest Skadden's charges, he thereafter effectively neutralized his own protests by paying or attempting to pay Skadden's bills, and by apologizing for his delinquencies.

Angulo has therefore failed to make out a defense of "mistake" or "inequity."

C. Defendant's remaining contentions:

(1) Angulo contends that Skadden's real and only client was ACC, not Angulo individually, and to the extent that Angulo signed anything it was in his corporate capacity. This assertion is contradicted by all of the evidence in the record. Firstly, Angulo admits in his affidavit that he *and* his corporation, ACC, were sued by

Hassan Nemazee. Among other things, Nemazee, had accused Angulo of breach of fiduciary duty, and wanted Angulo removed from all positions of authority in the Partnership. Upon receipt of Nemazee's lawsuit, Angulo consulted Skadden for "a defense." *See* Angulo's Affidavit of June 27, 2003, pp. 3, 9. Thereafter all bills were sent by Skadden to Angulo at his Star office, and none of the invoices contains any reference to ACC. All of Angulo's letters to Skadden, e.g., apologizing for the stopped checks, were written and signed by Angulo personally. Indeed, Angulo concedes the personal nature of the debt when he relates that he borrowed money from his parents to pay his Skadden bills. *Id.* at 13. *See, e.g., Marchi Jaffe Cohen Crystal Rosner & Katz* v. *All-Star Video Corp., supra* (record did not support defendant's assertion that plaintiff's bills were a corporate and not a personal obligation).

(2) Angulo next argues that plaintiff's breach of contract cause of action should be dismissed because there was no written retainer agreement, and because Skadden's "hourly rates have never been disclosed." Angulo cites no authority for this proposition. Rather, it is well-established that an attorney may enter into an oral retainer agreement with his client, and that such agreement operates as an express contract. *See Paulsen* v. *Halpin,* 74 A.D.2d 990 (4th Dept. 1980). That such an agreement was operative here is reflected in the behavior of both parties, and the record reflects that Skadden fully performed its side of the bargain. Angulo had to have been aware of Skadden's billing rate, at latest when he began receiving bills; and his initial payment of all bills without objection establishes that he considered the

fee *rate* to be reasonable, or at least not unexpected.[3] *See e.g., O'Connell and Aronowitz* v. *Gullo, supra,* at 638.

(3) Angulo finally also cross-moves to dismiss plaintiff's third cause of action, contending, that he is not personally liable for the bounced checks that he wrote against Star's account, because, under UCC 3-403, Angulo had signed the checks only "as an authorized representative of the *Star.*" Angulo also suggests that because any "replacement" of a bounced check by a smaller check had been consented to by Glekel, the amount of the bounced check should be subtracted from his total debt.[4]

Section 3-403 of the Uniform Commercial Code was designed to protect corporate officers or other authorized agents from personal liability for the obligations of their corporation or principal. However, to secure the protection of this provision, the requirements of UCC 3-403(3) must be satisfied—that is, "the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity." Here, Angulo sent Skadden payments on a San Juan Star check, signing his name over a line under which is printed "authorized signature." Nowhere does Angulo's "title" appear. *See Appletiser S. Afr. Ltd.* v. *Bank Leumi Trust Co. of New York,* 94 Civ. 3517, 1995 WL380087 (S.D.N.Y. June 27, 1995) (secretary of Corporation who signed back of draft with his name and a stamp marked "accepted by auth. signa-

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[3] According to Angulo's own account, his first complaint to Glekel about the bill for February 1996 concerned the number of hours, not the rate per hour, as evidenced by the fact that Angulo was appeased when Glekel explained that the steepness of the bill was due to the *quantity* of "learning time at the outset of a case."

[4] The Court will not dignify this last contention with any discussion.

ture," without including his title, did not meet requirements of UCC 3-403 to be relieved of personal liability); *see also Mencher* v. *Weiss*, 306 N.Y.1, 10 (1959).

In any event, quite independent of the statutory niceties of UCC 3-403(3), it is clear that the Star had no obligation to Skadden for legal services. Angulo was merely using the Star's funds to discharge his personal obligation to Skadden. Accordingly, when he signed the fifteen Star checks, Angulo was acting on his own behalf rather than in his capacity as an authorized Star representative. In a letter dated December 14, 2000, Angulo apologized for stopping several Star checks, and reassured Glekel: "the cancelled checks will be replaced by *me*. I am preparing a new plan to make good on these payments. I hope that I will be able to catch up quickly." *See* Ex. N to Glekel Affirmation, emphasis supplied. *See also, Marchi Jaffe Cohen Crystal Rosner & Katz* v. *All-Star Video Corp., supra* (defendant's letter established that she assumed personal liability for legal bills); *cf. Arde Apparel, Inc.* v. *Matisse Ltd.*, 240 A.D.2d 328, 330 (1st Dept. 1997) (signer of corporate checks *was* shielded from personal liability under UCC 3-403 because he "had *not* drawn the sued upon checks . . . to satisfy a personal obligation") (emphasis supplied).

D. Defendant's counterclaim:

That branch of plaintiff's motion which seeks to dismiss defendant's counterclaim is granted, without opposition by defendant. As has been discussed above, defendant has not made out his claim of "fraud," nor has he established defenses of "mistake" or "inequity." Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its second and third causes of action, as well as

for dismissal of defendant's counterclaim, is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $814,749.10, together with interest at the statutory rate beginning 30 days from the date of each invoice, as calculated by the Clerk, and together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant's cross-motion, to dismiss plaintiff's first and third causes of action, is denied.

The foregoing constitutes the Decision, Order and Judgment of the Court.

SHIRLEY WERNER KORNREICH
SHIRLEY WERNER KORNREICH

Dated: November 21, 2003
New York, New York

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on April 19, 2005.

PRESENT

Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
Betty Weinberg Ellerin
Milton L. Williams
John W. Sweeny, Jr., Justices.

M-1179
Index No. 600814/03

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP,

Plaintiff-Respondent,

—against—

GERARD ANGULO,

Defendant-Appellant.

Defendant-appellant having moved for reargument of the decision and order of this Court entered on February 8, 2005 (Appeal No. 5317),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

CATHERINE O'HAGAN WOLFE

Clerk.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 8, 2005.

PRESENT

Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
Betty Weinberg Ellerin
Milton L. Williams
John W. Sweeny, Jr., Justices.

5317

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP,

Plaintiff-Respondent,

—against—

GERARD ANGULO,

Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about December 3, 2003, deemed an appeal from the judgment, same court and Justice, entered December 4, 2003,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed for the reasons stated by Kornreich, J., without costs or disbursements.

ENTER:

CATHERINE O'HAGAN WOLFE

Clerk.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth day of May 2005

PRESENT,

HON. JUDITH S. KAYE, *Chief Judge, presiding*

1-10 Mo. No. 322

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP,

Respondent,

—against—

GERARD ANGULO,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

United States Constitution

Fourteenth Amendment—
Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

U.S.C.A. Constitution. Amend. XIV, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Civil Practice Law and Rules, New York Consolidated Laws, Ch. 8, Rule 3212, provides, in pertinent part:

Motion for summary judgment. (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The

motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

* * *

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just. party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion

New York Civil Practice Law and Rules, New York Consolidated Laws, Ch. 8, Rule 3214(b) provides:

Stay of disclosure. Service of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise. If the motion is based solely on the defense that the summons and complaint, summons with notice, or notice of petition and petition was not properly served, disclosure shall not be stayed unless the court orders otherwise.

[LETTERHEAD OF ZEICHNER ELLMAN & KRAUSE LLP]

February 26, 2003

Ex. A – Letter from Stuart Krause to Hon. Richard M. Berman, dated February 26, 2003 473-474

VIA HAND DELIVERY

Hon. Richard M. Berman
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street
Courtroom 706
New York, N.Y. 10007

Skadden, Arps, Slate, Meagher & Flom LLP
v. Angulo, Civ. No. 02-9322 (RMB)

Dear Judge Berman:

We are counsel to plaintiff Skadden Arps. During the telephone conference on February 20, 2003, after the parties were unable to resolve this matter, this Court ordered that discovery take place over the next 30 days, and scheduled a settlement conference for March 25, with clients in attendance. We write to advise the Court that we have discovered a flaw in this Court's subject matter jurisdiction over this action.

We are mindful of the parties' obligations to bring matters such as this to the Court's attention at an early stage, particularly because the lack of subject matter jurisdiction may be raised at any stage, and the absence of such jurisdiction renders proceedings in the case void.

We pled diversity jurisdiction, assessing the citizenship of plaintiff Skadden Arps under the well settled principle that a partnership is a citizen of each state where its partners are citizens. In this case, the defendant is a citizen of Puerto Rico. While plaintiff Skadden Arps is an international law firm partnership, it has no offices in Puerto Rico, and no partners who are citizens of Puerto Rico. Hence it appeared that complete diversity existed. Indeed, in his answer, defendant admitted subject matter jurisdiction.

However, we have learned that in the case of *The Herrick Company. Inc. v. SCS Communications, Inc.*, 251 F.3d 315 (2d Cir.2001), the United States Court of Appeals for the Second Circuit held that when a partnership is composed in part of United States citizens who have moved abroad to a foreign office of the partnership, such partners may no longer be domiciled in the state of the United States in which they previously resided, and hence cannot be considered citizens of a state for purposes of 28 USC § 1332. At the same time they are not to be considered citizens or subjects of a foreign state for purposes of 28 USC § 1332. As a result, such persons have no access to the federal courts under diversity jurisdiction, and in fact destroy access to the federal courts under diversity jurisdiction for a partnership in which they are partners

While we question the correctness and rationale of this ruling, and while it does indeed result in aliens having greater access to the federal courts than some U.S. citizens, nevertheless the holding of the Second Circuit is unambiguous. We have questioned our client, and it appears that one or more of Skadden Arps' partners residing abroad at the time our complaint was filed will not be able to prove that they continue to be domiciled

in a state of the United States, under the guidelines discussed in *Herrick*, *supra*.

Skadden Arps' reply to the defendants' counterclaim is due to be served by today, and until this issue is resolved we will continue to proceed with this action. However, we respectfully request a conference to discuss whether a dismissal for lack of subject matter jurisdiction is appropriate.

Respectfully submitted,

STUART A. KRAUSE

Stuart A. Krause

cc: Eric W. Berry, Esq. By Hand
Jeffrey Glekel, Esq.